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Solidarity in the Case Law of the European Court of Justice

Opportunities Missed?

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1 Introduction

Achieving and maintaining solidarity in the European Union (EU) increasingly seems challenging: political projects prioritising individual nation states and renouncing any solidarity beyond national borders are gaining in momentum. The 2016 'Brexit' vote in the UK epitomises these tendencies, though scepticism of any form of transnational solidarity is certainly shared by more Europeans than those English voters supporting 'LEAVE'. Can the EU survive as a project of a community based on law that promotes transnational solidarity? The EU Treaties at least express that solidarity is one of the EU's fundamental values (Articles 2, 3 (2) Treaty on European Union [TEU]). In a community of law, the validity of this value would depend on its capacity as a legal principle. This chapter explores whether and how far the case law of the Court of Justice (ECJ) supports solidarity as an EU constitutional law principle.

This chapter does not endeavour to compete with the expansive discussion on what solidarity may mean.[1] Instead, it focuses on the question

[1] Recently see, with a focus on EU perspectives, A. Biondi, E. Dagilyte andE. Kucuk, *Solidarity in EU Law: Legal Principle in the Making* (Cheltenham: Edward Elgar, 2018); G. Butler, 'Solidarity and its limits for economic integration in the European Union's internal market', *Maastricht Journal of European and Comparative Law*, 25(3) (2018), 310–31; I. Ciornei andE. Recchi, 'At the source of European solidarity: assessing the effects of cross-border practices and political attitudes', *Journal of Common Market Studies*, 55(3) (2017), 468–85; C. Lahusen and M. Grasso (eds.), *Solidarity in Europe. Citizens' Responses in Times of Crisis* (London: Palgrave Macmillan, 2018); D. Schiek, 'Perspectives on social citizenship in the EU: from status positivus to status socialis activus via two forms of transnational solidarity', in D. Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge: Cambridge University Press, 2017); S. Sciarra, *Solidarity and Conflicts.*

of what solidarity signifies as a constitutional concept of EU law. Since the EU's integration project ultimately aims at linking societies of Member States,[2] it is not surprising that solidarity emerges as a central EU value in the Treaties' norms and preambles. Linking societies of Member States through the integration project ultimately presupposes that the interaction of citizens eventually leads to solidarity bonds beyond the nation states, through a re-orientation of both Member States and citizens towards transnational solidarity. Citizens need to be prepared to regard citizens of other Member States as equally worthy of inclusion.[3] Member states should support such developments by embracing solidarity as a value of the EU that is common to the Member States. Nevertheless, a number of authors continue to promote the limitation of practical solidarity to the national level,[4] possibly supported by a 'holding environment' at EU level.[5] There are reasons to doubt whether the implicit separation of economic integration at EU level and social integration at national levels can succeed.[6] More likely, if solidarity is not enacted at EU level, EU policies pursued may well result in social deprivation in citizens' lives, especially in Member States whose economy does not yield a constant export surplus.

Instead of developing a definition of solidarity, this chapter asks what, if anything, the case law of the ECJ[7] contributes to the discursive exegesis of solidarity as a principle of EU law. In order to answer this question, it offers an empirical analysis of the Court's case law framing the notion of

European Social Law in Crisis (Cambridge: Cambridge University Press,2018); as well as the contributions in this edited collection.

[2] D. Schiek, *Economic and Social Integration. The Challenge for EU Constitutional Law* (Cheltenham: Edward Elgar, 2012).

[3] See on this perspective: J. Gerhards and H. Lengfeld, *Citizenship and Social Integration in the European Union* (Abingdon: Routledge, 2015).

[4] E.g. under the heading of 'conflicts law constitutionalism' by C. Joerges, 'Social justice in an ever more diverse union', in F. Vandenbroucke, C. Barnard and G. D. Baere (eds.), *A European Social Union after the Crisis* (Cambridge: Cambridge University Press, 2017), pp. 105–7.

[5] F. Vandenbroucke, 'The idea of a European social union', in Vandenbroucke, Barnard and Baere (eds.), *A European Social Union after the Crisis*, pp. 3–46.

[6] Schiek, *Economic and Social Integration,* pp. 215–43; Schiek, Perspectives on social citizenship in the EU, pp. 345–54.

[7] The Court of Justice of the European Union (CJEU) consists of the Court of Justice (still abbreviated to ECJ), the General Court (GC) and special courts, whose number can be expanded (see Article 19 TEU). Our analysis is confined to ECJ cases, because it reviews the case law of the GC, hears all national references (Article 267 TFEU) and thus has the best opportunity to elaborate how EU law should interact with national law and socio-economic reality.

solidarity. The analysis is not limited to cases which have gained the status of key cases in a largely undisclosed process of peer consensus. Instead, we use a method suitable to identify all cases in which the concept of solidarity was not only mentioned, but also relevant. Thus, we analyse the full extent of the Court's discourse on solidarity, rather than adding to the literature on those cases which have long been identified as key cases in the area.

The next section introduces the methodology used for identifying and analysing the case law sample, and explains what this methodology seeks to achieve. Though this chapter is not on the concept of solidarity from a philosophical, sociological or legal theory perspective, it is necessary to introduce the main content of solidarity as a concept in EU (Constitutional) Law, in order to identify the dimensions and types of solidarity we expect to find in the analysis. We distinguish four dimensions (solidarity between citizens, between Member States and the EU, between Member States and citizens, and international solidarity) and altogether six types of solidarity within the subcategories categorial definition (solidarity as charity, solidarity as mutual obligation, solidarity as risk mitigation) and functionalities (embedding individual rights, embedding the Internal Market, rejecting limiting effects of national solidarity). The third section presents the results of a content analysis of ECJ case law using the term 'solidarity'. The conclusion identifies a number of missed opportunities, in particular in recent years and in response to events perceived as critical junctures for the future of EU integration. The judicial response to Brexit constitutes one prime example for this: when the Court enabled the UK to revoke the notice of its intention to withdraw from the Union, it emphasised EU citizenship as fundamental status of the EU without any reference to the solidarity dimension of EU citizenship.[8] We conclude that there is much space for solidarity becoming more relevant to the Court's case law.

2 Analysing the Court's Discourse on Solidarity – Why and How

In analysing the Court's case law on solidarity, this chapter exposes the textual discourses of the Court's case law through an empirical analysis.[9] The purpose of this investigation is both explanatory and normative.

[8] This is discussed in more detail below, in the text around note 83.

[9] On this see already D. Schiek, 'Is there a social ideal of the European Court of Justice?', in: U. Neergaard, R. Nielsen and L. Roseberry (eds.), *The Role of Courts in Developing a European Social Model* (Copenhagen: DJØF Publishing, 2010), pp. 63–96; D. Schiek, 'Social ideals of the Court of Justice of the European Union', in: T. Evas, U. Liebert and

In so far as it is explanatory, the chapter contributes to understanding how judges deal with law's indeterminacy, as well as uncovering judges' ideas on adequate organisation of society represented in case law, which will be influential on the Court's future case law and on EU law- and policy-making more generally.[10] There is little doubt that the ECJ relies on more than positive law in its rulings. This is a logical consequence of law's principled indeterminacy, which requires any court to produce rules and participate in governance of society by making law, alongside parliaments and government.[11] As a consequence, no court can be but a political and social actor in deciding which aspects of an indeterminate norm to stress.[12]

For the EU judiciary, this role is compounded by its character as a constitutional court, whose tasks extend beyond mere interpretation of positive law. Article 19 Treaty on European Union (TEU) requires the Court to 'ensure that in interpretation and application of the Treaties the law is observed'. This phrase distinguishes between the positive law of the Treaties and the law elsewhere, referring to the difference between *lex*

C. Lord (eds.), *Multilayered Representation in the European Union: Parliaments, Courts and the Public Sphere* (Baden-Baden: Nomos, 2012), pp. 157–82.

[10] E. Achtsioglou and M. Doherty, 'There must be some way out of here: the crisis, labour rights and member states in the eye of the storm', *European Law Journal*, 20(2) 2014, 219–40, at 233–5.

[11] Aside from profound differences in detail, there is agreement in so far between linguists, positivists and different jurisprudential schools. Linguists agree on the existence of imbued meaning and the necessity of drawing on circumstantial knowledge when understanding textual language, which is also the starting point of critical discourse analysis, see T. v Leeuwen, 'Discourse as recontextualisation of social practice: a guide', in R. Wodak and M. Meyer (eds.), *Methods of Critical Discourse Analysis*, 2nd edition (London: Sage, 2009), p. 147. Positivist legal theorists acknowledge the open texture of law as described above, see L. Hart, *The Concept of Law (with a postscript by Penelope Bulloch and Joseph Raz)*, 2nd edition (Oxford: Oxford University Press, 1997), pp. 118, 123–26, but may prefer other terms, including 'uncertainty' (Hart) or judicial discretion or choice, see D. Leczykiewicz, 'Why do the European Court of Justice judges need legal concepts?', *European Law Journal*, 14(6) 2008, 773–86, at 774.

[12] This is upheld widely for the ECJ, see for example A. Stone Sweet, 'The European Court of Justice and the judicialization of EU governance', *Living Reviews in European Governance*, 5(2) 2010, 7–9; see also J. Bengoetxea, N. MacCormick and L. Moral Soriano, 'Integration and integrity in the legal reasoning of the European Court of Justice', in G. d. Búrca and J. H. Weiler (eds.), *The European Court of Justice* (Oxford: Oxford University Press, 2001), p. 43, who question the concept of a clear line between law and politics underlying the critique of the Court, suggesting that the challenge is to manage the inevitable overlap between law and politics in constitutional adjudication. The EU's highest judge accepts the necessity of 'non-deductive' arguments, i.e. reasoning not reliant on the text of EU norms, as a reality in the Court's daily work. K. Lenaerts, 'Discovering the law of the EU: the European Court of Justice and the comparative method', in T. Perisin and S. Rodin (eds.), The Transformation or Reconstitution of Europe (Oxford: Hart, 2018), p. 61.

and *ius*, which is acknowledged by most European languages.[13] The Court is thus charged with ensuring the congruence of positive law with justice derived from supra-positive law.[14] Contrary to a popular critique, fulfilling a constitutional court's task of deriving general principles of law from supra-positive sources does not constitute any illegitimate usurpation of parliamentary or government functions.

The question remains how the Court discharges with the task of finding justice beyond the positive law – and this is the question the selected method sets out to answer. It starts where the traditional methods of interpreting the positive law end, exploring how judges use their 'imagination'[15] through a systematic analysis of the Court's paradigmatic engagement with discourses in national societies and the emerging European society. It thus complements the academic works on the Court as a political actor.[16] In doing so, it shares some common ground with legal realism, a school which in the USA has seen a revival as New Legal Realism from 2005,[17] and is closely linked to empirical legal studies dedicated to either predicting future case law or to analysing interaction of societies with courts from.[18] New European Legal Realism[19] relates to this school as well as to Scandinavian Realism

[13] See also F. Jacobs, *The Sovereignty of Law. The European Way* (Cambridge: Cambridge University Press, 2007).

[14] See also T. Tridimas, 'The Court of Justice of the European Union', in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law, Volume 1: The European Union Legal Order* (Oxford: Oxford University Press, 2018), p. 583.

[15] L. Azoulai, 'The Court of Justice and the social market economy', *Common Market Law Review*, 45(5) 2008, 1335–46, at 1339–40.

[16] See for example K. Alter, *The European Court's Political Power* (Oxford: Oxford University Press, 2009); D. Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford: Oxford University Press, 2015); Stone Sweet, 'The European Court of Justice and the judicialization of EU governance'.

[17] See H. Erlanger et al., 'Is it time for a new legal realism?', *Wisconsin Law Review*, 2005(2) (2005), 353–63; V.Nourse and G. Shaffer, 'Varieties of new legal realism: can a new world order prompt a new legal theory?', *Cornell Law Review*, 95(1) (2010), 61–138.

[18] N. Barber, 'Legal realism, pluralism and their challengers', in U. Neegard and R. Nielsen (eds.), *European Legal Method – Towards a New European Legal Realism?* (Copenhagen: DJØF Publishing, 2013), pp. 189–209; M. C. Suchman and E. Mertz, 'Towards an new legal empiricism: empirical legal studies and new legal realism', *Annual Review of Law and Society*, 6(2010), 555–79; for a European example of new legal empirics attempting to predict ECJ case law see M. Malecki, 'Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgments of the chambers', *Journal of European Public Policy*, 19(1) (2012), 59–75.

[19] H. Koch, K. Hagel-Sørensen, U. Haltern and J.Weiler (eds.), *Europe. The New Legal Realism* (Copenhagen: DJØF Publishing, 2010); U. Neergaard and R. Nielsen (eds.),

a jurisprudential school seeking to derive the content of the law from observation of its operation, distancing itself from any normative theory.[20] A pragmatist approach led to observing the use of a variety of sources, including ideologies and the Zeitgeist.[21] The approach taken here takes on board the numerical dimension of empirical legal realism, though it is not concerned with judicial behaviour.[22]

The point of social ideal analysis is to identify the ideational and zeitgeisty elements of case law. Presupposing that law as a whole is a social practice,[23] the textual analysis addresses the discursive practice of courts. A court's discourse, though inherently authoritative, is not independent from other discursive practices in society. Law while endowed with its own internal logic, is at best semi-autonomous, but never fully self-referential.[24]

European Legal Method – Towards a New European Legal Realism? (Copenhagen: DJØF Publishing, 2013).

[20] R. Nielsen, 'Legal realism and EU law', in H. Koch, K. Hagel-Sørensen, U. Haltern and J. Weiler (eds.), *Europe. The New Legal Realism* (Copenhagen: DJØF Publishing, 2010), pp. 545–63; R. Nielsen, 'New European legal realism – new problems, new solutions?', in U. Neeergaard and R. Nielsen (eds.), *European Legal Method – Towards a New European Legal Realism?* (Copenhagen: DJØF Publishing, 2013), pp. 75–124.

[21] The latter is perceived as the base of Hjalte Rasmussen's European legal realism, see M. R. Madsen, 'Scandinavian (neo-)realism and European courts', in H. Koch, K. Hagel-Sørensen, U. Haltern and J. H. Weiler (eds.), *Europe: The New Legal Realism* (Copenhagen: DJØF Publishing, 2010), pp. 437–55.

[22] As are some of the legal realists from both sides of the Atlantic do: the US new legal realists Leiter describes analysing what courts do as the main interest of new and old legal realists, B. Leiter, 'Legal realisms, old and new', *Valparaiso Law Review*, 47(4) (2013), 949–963, while Nourse and Shaffer see judicial behaviour studies as only one of three strands of new legal realism, V. Nourse and G. Shaffer, 'Varieties of new legal realism: can a new world order prompt a new legal theory?', *Cornell Law Review*, 95(1) (2010), 61–138. For Scandinavian legal realists, courts are an important, if not the most important site of exploration, as law only becomes real when it is applied, Nielsen, 'New European legal realism – new problems, new solutions?', pp. 95–9).

[23] As a social practice, law only maintains a relative autonomy from socio-economic reality in which it develops, for Bourdieu the main distinction of his approach to law from Luhmann's systems theory, P. Bordieu, 'The force of law: towards a sociology of the juridical field', *The Hastings Law Journal*, 38 (1987), 805–53, at 816–53). For a more recent summary of law as a social practice see A. Marmor, 'The nature of law', in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Stanford, CA: Stanford University, 2011).

[24] Tuori suggests that systems theory might be usefully applied to the relation between law and politics, but loses its value in relating law to societies, K. Tuori, 'The relationality of European constitution(s). Justifying a new research programme for European constitutional scholarship', in U. Neergaard and R. Nielsen (eds.), *European Legal Method: Towards a New Legal Realism?* (Copenhagen: DJØF Publishing, 2013), pp. 26–30, with references to Luhman and Teubner. By contrast, Grimmel suggests that law relates to 'political realities', A. Grimmel, 'The uniting of Europe by transclusion: understanding

The normative dimension of the analysis is based on the assumption that case law as a discourse is constitutive of the EU's constitutional practice as well as conditioned by its normative foundations. Thus, the content of the Court's discourse matters, in that it conveys the finer granules of grand constitutional principles such as solidarity. In other words, we contend that what matters is not merely the Court's reaction to the increasing media coverage of its case law,[25] but also the Court's contribution to shaping the discourses on the content of central EU constitutional principles. It is the Court's privilege and opportunity to communicate to the public the content of those principles applied to everyday cases on the ground. The increasingly thorough press coverage of the Court's case law is only one indication of its relevance for the emerging European public sphere, and the EU's perception as a community of values. In times where solidarity of the Union with its Member States and its citizens is frequently doubted, nothing could be more important than a careful discourse of the Court filling solidarity as a central legal value of the EU[26] with life.

Conceiving EU case law as discourse that is socially constitutive and conditioned at the same time requires certain methodological choices. The assumption that the authority of case law is imbued in the text of the judgments, rather than in the persons of the judges, is a central tenet of social ideal analysis: its chosen method is a critical textual analysis. This textual approach is particularly adequate to the ECJ with its predominantly document-based procedure,[27] which also has engendered the habit of repeating

the contextual conditions of integration through law', *Journal of European Integration*, 36 (6) (2014), pp. 549–66, at 555, while having indicated earlier that it is autonomous from societal impact. A. Grimmel, 'Judicial interpretation or judicial activism? The legacy of rationalism in the studies of the European Court of Justice', *European Law Journal*, 18(4) (2012), 518–35, at 519.

[25] M. Blauberger et al., 'The ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence', *Journal of European Public Policy*, 25(10) (2018), 1422–41.

[26] As impressively presented by AG Bot in his opinion in case C-643/15 Slovakia v Council EU:C:2017:618, paragraphs 18, 'Solidarity is among the cardinal values of the Union and is even among the foundations of the Union. How would it be possible to deepen the solidarity between the peoples of Europe and to envisage ever closer union between those people, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation? I am referring here to the quintessence of what is both the raison d'être and the objective of the European project.'

[27] Tridimas, 'The Court of Justice of the European Union', pp. 599–601, pointing to the influence of English judges, which nudges the Court towards appreciating the oral elements of the procedure. This influence will decrease, though.

certain formulas verbatim in long lines of judgments.[28] The texts of these judgments are enunciated as collective decisions, much to the dismay of authors based in common law legal cultures with a more rhetorical tradition of adjudication.[29] This further supports the argument that at least for the ECJ it is adequate to evaluate the discourse transported by the texts themselves, rather than investigating the judges' motives.[30] The suggested research method thus utilises the abilities for hermeneutic analysis engendered by a legal education, and honed in legal scholarship.[31] It also goes well beyond classical legal method in its ambition to uncover ideals hidden in legal texts written by courts. This excludes following the conventional legal research method, which would focus on key cases that are identified as key cases through a process of peer conformity.[32] If we aim to capture the potential impact of judicial texts, we need to consider the totality of a certain case law section. Treating case law as empirical data in this way enhances the potential to generate new knowledge by establishing unique databases of case law. For the CJEU, this kind of analysis is eased by the existence of a searchable text data base, which enables researchers to use their own search terms and thus to capture the full extent of case law relevant to certain key concepts.

3 Solidarity as a Concept in EU Constitutional Law

This section establishes the conceptual matrix against which the notion of solidarity in ECJ case law will be analysed. To this end, it first sketches

[28] On the dominance of civil law traditions in the Court's procedure and practice see V. Perju, 'Reason and authority in the European Court of Justice', *Virginia Journal of International Law*, 49(2) (2009), 307–77, at 357.

[29] Malecki, 'Do ECJ judges all speak with the same voice?'; Perju, V., 'Reason and authority in the European Court of Justice'.

[30] M. Everson and J. Eisner, *The Making of a European Constitution: Judes and Law Beyond Constitutive Power* (Abingdon: Routledge, 2007), aim at unearthing those motives by interviewing judges. Similar aims can be pursued by combining case law analysis with experiments involving non-judicial actors, K. J. Bybee, 'Paying attention to what judges say: new directions in the study of judicial decisionmaking', *Annual Review of Law and Social Science*, 8(2012), 69–84, at 74.

[31] US Legal Realism has been criticised for not applying social science methodology consistently: realists, it is suggested, only do what lawyers do best: reading and analysing and systematising case law, B. Leiter, 'Legal realisms, old and new', *Valparaiso Law Review*, 47 (4) (2013), 949–63.

[32] For a traditional defence of this for EU law see G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012). From a more critical perspective, referring to the common law see J. Morison, 'What makes an important case? A research agenda', *Legal Information Management*, 12(4) (2012), 251–61.

solidarity as a concept, and then turns to it specification as an EU legal principle. Finally, dimensions and types of solidarity in EU constitutional law are identified, to serve as a coding system for analysing the Court's case law, alongside the policy fields in which solidarity can be expected to be used.

3.1 Solidarity as a Concept

Solidarity as a concept is not inherently legal. It originated as a fundamental concept in sociology and philosophy. The dualism proposed by Durkheim seems relatively modest today: he distinguished between mechanic solidarity, which is based on ties developed in small, closed groups (for example, by kinship), and organic solidarity, which emerges in industrial societies dependant on exchange between their individual members. Mechanic solidarity appears as a condition experienced as natural obligation, perhaps experienced as inescapable fate, or obligation.[33] Organic solidarity requires effort by a developed society, and the concept has been considered as unrealistic by critical voices.[34] Solidarity as a Weberian concept has been characterised as special type of social relationship established by the organising power of a polity.[35] Habermas' concept implicitly builds on the latter, in that Habermas characterises solidarity as emerging from a 'social context … created through politics',[36] in which the concept of fraternity and solidarity were initially used synonymously to capture the bond emanating from common humaneness in a 'secular religion of humanity'.[37] From a Weberian and/or Habermasian perspective, solidarity is congruent with the organic interrelation of members of the same social class after industrialisation. Solidarity also succeeded charity as a social institution offering relief to the poor: instead of hoping for gaining income from altruistic activities of the better off, the expansion of the non-possessing classes also enabled them to mutually support each other. Solidarity as risk mitigation through mutual obligation was born in the mutual societies in the early industrial age in Europe.[38] This element of solidarity is not always

[33] See on the latter A. Somek, 'Solidarity decomposed: being and time in European citizenship', *European Law Review*, 36(6) (2007), 787–818.
[34] F. d. Witte, 'The end of EU citizenship and the means of non-discrimination', *Maastricht Journal of Comparative and European Law*, 18(1–2) (2011), 86–108.
[35] M. Ross, 'Solidarity – a new constitutional paradigm for the EU?', in *Promoting Solidarity in the European Union* (Oxford: Oxford University Press, 2010), p. 26.
[36] J. Habermas, *The Lure of Technocracy* (London: Polity Press, 2015), p. 26.
[37] Habermas, *The Lure of Technocracy,* p. 27
[38] See for example J. Zeitlin, 'From labour history to the history of industrial relations', *The Economic Historic Review*, 40(2) (1987), 159–84.

recognised, in particular by writers who use solidarity as an overarching term encompassing altruistic activities as well as activities based on mutuality, that is, collective interest. For example, Stjernø's[39] conceptual matrix proposes a continuum from solidarity based on homogeneity, with a strong collective orientation, over solidarity through shared interests towards a universal solidarity towards the whole of humankind, with the latter category building on the more compassionate and altruistic motives of caring for humanity.

Understanding solidarity not as a feeling, or orientation, but rather as a set of potential courses of actions shaped by institutional environments, we can distinguish between participative and receptive solidarity.[40] The former is expressed by collective or common action of those connected by common interests, while the latter is experienced in receiving benefits or other payments. As expanded before, both forms of solidarity move beyond solidarity as charity or spontaneous emotion in that they are organised on the basis of principles and norms, frequently enshrined in law. This corresponds to the fact that solidarity in post-mechanic societies in the Durkheimian sense depends on institutions, such as rights guarantees. These presuppose interaction with fellow citizens for creation and enforcement, as well as a constituted polity. Those interactions are not necessarily constrained within the boundaries of nation states. They could potentially encompass the world, or in our case transcend borders within the transnational entity constituted by the EU.

3.2 Solidarity in the EU Treaties

The EU since the Treaty of Lisbon, has enhanced its statutory commitment to solidarity, giving rise to solidarity as a new constitutional principle.[41] According to the TEU preamble, the Union is motivated by the desire to deepen solidarity between the Member States' peoples, while the preamble to the TFEU adds solidarity between the EU and the overseas countries, as already contained in the preamble to the Treaty on European Economic Community (EEC Treaty).[42]

[39] S. Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge: Cambridge University Press, 2009).

[40] Schiek, 'Perspectives on social citizenship in the EU'.

[41] See Ross, 'Solidarity – a new constitutional paradigm for the EU?'.

[42] U. Neergaard, 'In search of the role of solidarity in primary law and the case law of the European Court of Justice', in U. Neergaard, R. Nielsen and L. Roseberry (eds.), *The Role*

The first mentioning of solidarity in the Treaties appears in the TEU provision of values of the Union, which links the concept to the society:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. (Article 2 TEU)

The fact that solidarity is only mentioned in the second sentence may be read as incorporating a certain scepticism towards solidarity as a European value. Such scepticism would be based on the idea that activities epitomising solidarity, such as asset distribution and community building, require a pre-legal and pre-constitutional bond between peoples that does not exist beyond the boundaries of nation states. In this narrative, any dense constitution rooted in societies can only prevail in Member States, while the EU can never hope to proceed beyond mere formal or 'international' ties between Member States.[43] However, taking Article 2 TEU seriously, we suggest that the long process of constructing this provision[44] did purposely result in a clause which conceptually links Member States and the Union through the value of solidarity. It is correct that the provision lists the ingredients of liberalist constitutionalism in its first sentence, which may conjure the image of an abstentionist Union neither actively safeguarding human rights nor promoting their factual relevance. However, even that first sentence lists human dignity as a value, which constitutes a reference to the humane beyond liberal notions.[45] The first sentence also refers to equality, which again limits a mere liberal constitutional stance in that equal freedom demands an equitable distribution of assets.[46] Finally, the link between the first and the second sentence and the contents of

of Courts in Developing a European Social Model (Copenhagen: DJOV Publishing, 2010), pp. 97–138, reproduces specifications of solidarity in the EEC and EC treaties.

[43] See, for example, D. Grimm, *The Constitution of European Democracy* (Oxford: Oxford University Press, 2017), pp. 164–5.

[44] Article 2 TEU was originally drafted in the Constitutional Convention.

[45] On this see D. Kostakopoulou and N. Ferreira, *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge: Cambridge University Press, 2015).

[46] U. Steinvorth, *Gleiche Freiheit. Politische Philosophie der Verteilungsgerechtigkeit* (Berlin: Akademie Verlag, 1999).

the second sentence matter. The second sentence links the values to the Member States, these are their common values. It also links them to the society (singular), instead of using the grammatical plural (societies). Article 2 TEU second sentence does thus not refer to national societies, conceiving these as distinct entities in each Member State. Instead, the provision presupposes that one European (or EUropean) society is emerging through the medium of European integration. Article 2 TEU posits normatively that this European society is informed by solidarity among other principles. It also relates to the Member States, thus paying tribute to the multi-level nature of the EU. Solidarity thus becomes a precondition for the existence of the EU's values.

3.3 *Identifying Dimensions and Types of Solidarity for Coding Case Law Analysis*

Even in the absence of a specific definition of solidarity as a constitutional key concept, the Treaties provide some orientation in that they specify relational dimensions of solidarity:[47] solidarity between the Union and Member States, solidarity between Member States, solidarity between Member States and citizens (of other Member States) and solidarity between individuals (for example, between generations). While it may seem counterintuitive that institutions such as the Member States or the EU as such can engage in solidarity, solidarity between the Union and the Member States, as well as mutual solidarity of Member States ultimately serves the ever closer union of peoples (Article 1 TEU), and thus also citizens, albeit indirectly. If Member States are required to exercise solidarity towards citizens of other Member States, this constitutes indirect solidarity of their citizens with those EU foreigners: after all the exercise in solidarity diminishes the funds available for national citizens. Similarly, solidarity between Member States can be viewed as indirect solidarity between their citizens as well. With this qualification, we arrive at four dimensions of solidarity, as indicated in the graph below.

Regarding the different notions of solidarity as they may emerge from the historical origin of the concept and different ideational approaches to

[47] See also I. Domurath, The three dimensions of solidarity in the EU legal order: limits of the judicial and legal approach', *Journal of European Integration*, 35(4) (2013), 459–475; P. Hilpold, 'Understanding solidarity within EU law: an analysis of the "islands of solidarity" with particular regard to monetary union', *Yearbook of European Law*, 34(1) (2015), 257–85.

Figure 12.1 Dimensions of solidarity

its use, the Treaties do not offer any orientation. Thus, we would expect that the Court (alongside national courts, whose case law on solidarity under EU law is beyond the confines of this chapter) interprets and specifies solidarity. Deriving from the cursory overview of different approaches to solidarity, we would expect the case law to move between five types of solidarity, which on the one hand categorise solidarity and on the other hands allocate functions to solidarity specific for EU constitutional law.

We can distinguish three categorial types of solidarity. First, there is the option that solidarity is defined as the continuity of charity from premodern times. This form of solidarity would be characterised by a voluntary activity based on entirely altruistic motives, where the actor may follow an ethical or moral impetus, but which is beyond the realm of legal obligation. Second, if embracing the conceptual shift from charitable care for the poor to self-government of those who can only rely on their own work to sustain themselves, the notion of solidarity changes fundamentally. Solidarity is not a noble act based on potentially condescending altruism, but rather in principle based on mutual support. Instead, the contribution to a solidarity system are undertaken in the understanding that standing together individuals can shoulder risks they would be unable to bear individually. Even for the lucky ones who never need to rely on the activation of solidarity, being part of the system of mutual contributions grants the trust that they could rely on the collective. This leads to the third categorial type of solidarity, in which solidarity mitigates risks emanating from a fundamentally risky economic process governed not by plan and structure, but instead by market forces. In order to mitigate these market-driven risks, it is necessary to combine forces – even though there is no guarantee that each contribution (whether monetary or in kind) will be valued by actual support.

The categorial types of solidarity imply the functional types, which identify for which purpose (within the EU integration project) solidarity can be used. Here we expected two different types. Solidarity requires the obligation to contribute to a system even if an individual may not gain from his or her contributions. In a way solidarity thus defies individual

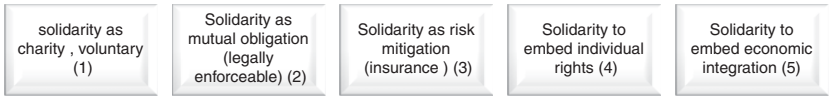

Figure 12.2 Categorial and functional types of solidarity

rights, which would demand that relinquishing property is rewarded in proportion to the contribution made. This means that the existence of solidarity bonds can also be used to justify limiting individual rights. Expressed differently, solidarity as a legal principle reminds us of the relational character of rights guarantees: rights can only be enjoyed in association with others, by an individual embedded in society. Solidarity thus serves to embed individual rights in society, or in the transnational integration of societies within the EU. While the fourth type of solidarity serves to embed individual rights, a fifth type is to be expected in the European Union as an entity integrating markets through legally enforceable institutions such as the economic freedoms and competition law. Those institutions frequently clash with national institutions established to engender that risk mitigation which is addressed by the second dimension of solidarity. Organising processes at national, subnational or perhaps even transnational level on the basis of solidarity can thus serve to justify restrictions of economic freedoms or the non-applicability of EU competition law because the entity acting on a market cannot be considered as an undertaking due to its solidarity-based constitution.

The categorial and functional types of solidarity are conceptually distinguished, though we must expect some overlap in the case law analysis: as stated, the limitation of individual rights as well as EU market-integrating concepts such as economic freedoms and competition rules is closely related to the function of solidarity as creating mutual obligations and as enabling the mitigation of risks. Case law categorisation will thus have to identify which type is most relevant to the case at hand.

4 Analysing CJEU Case Law in the Field

4.1 Identifying relevant cases

In order to identify all the cases using solidarity, the search function on case law on the CJEU web page was utilised. The search was limited to closed cases, and to those decided by the ECJ. The search for the term 'solidarity' for the period from the beginning of records in 1958 to March 2019 brought

up 348 cases. For the evaluation, cases were excluded where 'solidarity' is cited from the name of parties, national institutions, national or EU legislation, although neither the EU Commission, any of the parties, the advocate general (AG) or the Court engaged substantively with the concept. These exclusions left 122 cases for evaluation.[48]

4.2 Analysis Step One: Overall Picture

The use of solidarity increases considerably over time, as can be established by grouping the analysis into five periods, separated by treaty reforms.

As the Figure 12.3 demonstrates, the ECJ did not depend on explicit treaty provisions on solidarity to develop the concept. The first case to mention solidarity was decided in December 1969,[49] and twelve more cases followed until the Single European Act was adopted. The notion of solidarity was used in a variety of areas, including value added tax, accession of the UK, staff regulations, agriculture and fisheries, as well as the fields identified as particularly relevant from today's perspective. Nevertheless, the use of solidarity in the Court's case law remained comparatively infrequent after the first treaty reform, the Single European Act 1987 and even after the Treaty of

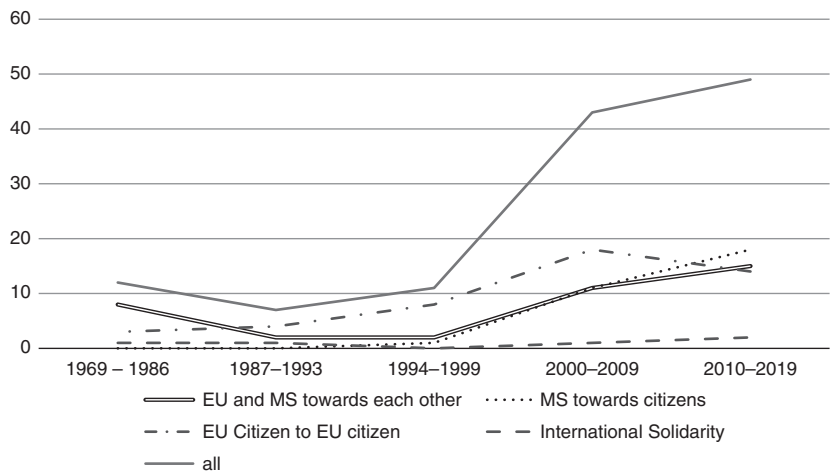

Figure 12.3 Frequency of dimensions of solidarity in ECJ case law over time

[48] Tables 12.1–5 listing the 122 cases chronologically and identifying which dimension and type of solidarity they were categorised under are available at the end of the chapter.

[49] Case 6/69 *COM* v. *France* EU:C:1969:68.

Table 12.1 *Phase 5: 2010–19 (eight years three months, forty-nine cases – about six annually)*

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
1	C-216/18 PPU	Opinion ECLI:EU:C:2018:517 Judgment ECLI:EU: C:2018:586 Grand Chamber	28/06/2018 25/07/2018	Minister for Justice and Equality (Défaillances du système judiciaire)	area of freedom, security and justice – judicial cooperation in criminal matters	**2 C c**
2	C-412/17	Opinion ECLI:EU:C:2018:671	06/09/2018	Touring Tours und Travel	area of freedom, security and justice	**2 c C**
03	C-221/17	Opinion ECLI:EU: C:2018:572; Judgment ECLI:EU:C:2019:189	12/07/2018 12/03/2019	Tjebbes and Others	Citizenship of the Union	**4 a A**
04	C-163/17	Opinion ECLI:EU:C:2018:613 Judgment ECLI:EU: C:2019:218	25/07/2018 10/03/2019	Jawo	area of freedom, security and justice – asylum policy	**2 c C**
05	C-651/16	Judgment ECLI:EU:C:2018:162	07/03/2018	DW	Freedom of movement for workers	**6 g A**
06	C-646/16	Opinion ECLI:EU:C:2017:443; Judgment ECLI:EU:C:2017:586	08/06/2017ö 26/ 07/2017	Jafari	area of freedom, security and justice – asylum policy	**3 c C**

Table 12.1 (*cont.*)

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
07	C-490/16	Opinion ECLI:EU:C:2017:443 Judgment (GC) ECLI:EU: C:2017:585	08/06/2017 26/07/2017	A.S.	area of freedom, security and justice – asylum policy	**2a c C**
08	C-442/16	Opinion ECLI:EU:C:2017:607 Judgment (GC) ECLI:EU: C:2017:1004	26/07/2017 20/12/2017	Gusa	Social security	**3 g A**
9	C-367/16	Opinion ECLI:EU:C:2017:636 Judgment (GC) ECLI:EU: C:2018:27	06/09/2017 23/01/2018	Piotrowski	area of freedom, security and justice – judicial cooperation in criminal matters	**2 c A**
10	C-259/16	Opinion ECLI:EU:C:2017:910 Judgment ECLI:EU: C:2018:370	28/11/2017 23/05/2018	Confetra and Others	Freedom of establishment	**5 b B**
11	C-226/16	Opinion ECLI:EU:C:2017:616 Judgment ECLI:EU: C:2017:1005	26/07/201720/12/ 2017	Eni and Others	Energy	**3 e C**

12	C-643/15	Opinion ECLI:EU:C:2017:618, Judgment ECLI:EU:C:2017:631	26/07/2017, 6 /09/ 2007 GRAND CHAMBER	Slovakia v Council	area of freedom, security and justice	**3 c C**
13	C-589/15 P	Opinion ECLI:EU:C:2017:175, Judgment ECLI: EU:C:2017:663 GRAND CHAMBER	07/03/2017, 12/09/ 2017	Anagnostakis v Commission	Economic and monetary policy	**2 d C**
14	C-638/16 PPU	Opinion ECLI:EU:C:2017:93 Judgment ECLI:EU: C:2017:173	07/02/2017 07/03/2017	X and X	Fundamental rights – Charter of Fundamental Rights	**2 c C**
15	C-404/15, 659/ 15 PPU	Judgment ECLI :EU : C :2016 :198 Opinion Bot ECLI:EU:C:2016:140	5 April 2016 3 March 2016	Pál Aranyosi (C-404/15) and Robert Căldăraru	European arrest warrant – Grounds for refusal to execute – Charter of Fundamental Rights of the European Union – Article 4 – Prohibition of inhuman or degrading treatment	**1 D c**

Table 12.1 (*cont.*)

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
16	C-296/15	Judgment ECLI:EU:C:2017:431	08/06/2017	Medisanus	Approximation of laws	**3 b A**
17	Avis 3/15	Opinion Court (GC) ECLI:EU:C:2016:657 Opinion AG Wahl	March 2017 – not accessible 08/09/2016	Avis rendu en vertu de l'article 218, paragraphe 11, TFUE	Provisions governing the institutions	**6 f D**
18	C-201/15	Judgment (op) ECLI:EU:C:2016:972 (Grand Chamber)	21/12/2016	AGET Iraklis	Approximation of laws	**6 g B**
19	C-431/14 P	Judgment ECLI:EU:C:2016:145	08/03/2016	Greece v Commission	Competition – State aid	**6 b B**
20	C-346/14	Judgment ECLI:EU:C:2016:322	04/05/2016	Commission v Austria	Environment	**5 (environmental) C**
21	C-185/14	Judgment (Sum) ECLI:EU:C:2015:716	22/10/2015	EasyPay and Finance Engineering	Competition – state aid – services of general economic interest (wrong classification as tax)	**5 b C**

22	C-179/14	Judgment ECLI:EU:C:2016:108	23/02/2016	Commission v Hungary	Freedom of establishment	**6 b A**
23	C-50/14	Judgment ECLI:EU:C:2016:56	28/01/2016	Časta and Others	Principles, objectives and tasks of the Treaties	**5 b B**
24	C-25/14	Judgment (op) ECLI:EU:C:2015:821	17/12/2015	UNIS	Freedom to provide services	**6 b B**
25	C-543/13	Judgment (op) ECLI:EU:C:2015:359	04/06/2015	Fischer-Lintjens	Social security	**6 g B**
26	C-361/13	Judgment ECLI:EU:C:2015:601	16/09/2015	Commission v Slovakia	Freedom of movement for workers	**5 b A**
27	C-268/13	Judgment ECLI:EU: C:2014:2271	09/10/2014	Petru	Social security	**6 g A**
28	C-113/13	Judgment (op) ECLI:EU: C:2014:2440	11/12/2014	Azienda sanitaria locale n. 5 «Spezzino» and Others	Freedom of establishment	**5 b B**
29	C-574/12	Judgment (op, sum) ECLI:EU: C:2014:2004 5th chamber	19/06/2014	Centro Hospitalar de Setúbal and SUCH	Freedom of establishment	**6 b B**

Table 12.1 (*cont.*)

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
30	C-507/12	Opinion ECLI:EU:C:2013:841	12/12/2013	St Prix	Citizenship of the Union – right of Entry and Residence	**3 a A**
31	C-370/12	Judgment (View) ECLI:EU:C:2012:756	27/11/2012	Pringle	Economic and monetary policy	**1 d C**
32	C-166/12	Judgment ECLI:EU:C:2013:792	05/12/2013	Časta	Staff Regulations of officials and Conditions of Employment of other servants	**4 g A**
33	C-140/12	Judgment (op) ECLI:EU:C:2013:565 Third	19/09/2013	Brey	Citizenship of the Union – Right of entry and residence	**2 a A**
34	C-136/12	Judgment ECLI:EU:C:2013:489 (fourth chamber)	18/07/2013	Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato	Principles, objectives and tasks of the Treaties	**5 b B**

35	C-57/12	Judgment (op) ECLI:EU:C:2013:517 First Chamber	11/07/2013	Femarbel	Freedom to provide services	**1 b A**
36	C-433/11	Opinion EU :C :213 :6	10/01/2013	Jeltes and Others	Social Security	**2, g, A**
37	C-179/11	Judgment (op, SUM) ECLI:EU:C:2012:594	27/09/2012	Cimade and GISTI	area of freedom, security and justice – asylum policy	**3 c C**
38	C-75/11	Judgment (OP) ECLI:EU:C:2012:605	04/10/2012	Commission v Austria	non-discrimination – Non-discrimination on grounds of nationality (Citizenship)	**2 a A**
39	C-606/10	Judgment ECLI:EU:C:2012:348	14/06/2012	ANAFE	area of freedom, security and justice – Border checks	**2a c C**
40	C-562/10	Judgment ECLI:EU:C:2012:442	12/07/2012	Commission v Germany	Freedom to provide services	**5 b A**

Table 12.1 (*cont.*)

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
41	C-411/10	Judgment (op) ECLI:EU:C:2011:865 Grand chamber	21/12/2011	N. S.	Principles, objectives and tasks of the Treaties	**2 c C**
42	C-149/10	Judgment ECLI:EU:C:2010:534	16/09/2010	Chatzi	Social policy	**1 g B**
43	C-490/09	Judgment ECLI:EU:C:2011:34	27/01/2011	Commission v Luxembourg	Freedom to provide services	**6 b A**
44	C-437/09	Judgment (op, SUM) ECLI:EU:C:2011:112	03/03/2011	AG2 R Prévoyance	Competition – Agreements, decisions and concerted practices	**5 b B**
45	C-345/09	Judgment (op, SUM) ECLI:EU:C:2010:610	14/10/2010	van Delft and Others	Social security	**4 g B**
46	C-492/08	Judgment (op) ECLI:EU:C:2010:348	17/06/2010	Commission v France	Taxation – Value added tax	**6 b B**

47	C-271/08	Judgment ECLI:EU:C:2010:426 (Grand Chamber)	15/07/2010	Commission v Germany	Freedom of establishment	**6 b B**
48	C-135/08	Judgment (SUM) ECLI:EU:C:2010:104	02/03/2010	Rottmann	Citizenship of the Union	**4 A**
49	C-51/08	Judgment ECLI:EU:C:2011:336	24/05/2011	Commission v Luxembourg	Freedom of establishment – AG	**6 b A**

Table 12.2 *Phase 4: Treaty of Amsterdam to Treaty of Lisbon (2000–10) forty-three cases, more than four annually*

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
50	C-350/07	Judgment (op, SUM) ECLI:EU:C:2009:127	05/03/2009	Kattner Stahlbau	Competition – Agreements, decisions and concerted practices Social insurance and solidarity	**3 b B**
51	C-300/07	Judgment (op) ECLI:EU:C:2009:358	11/06/2009	Hans & Christophorus Oymanns	Freedom of establishment [solidarity and social insurance bodies]	**6 b B**
52	C-166/07	Judgment (op) ECLI:EU:C:2009:499	03/09/2009	Parliament v Council	Provisions governing the institutions – Acts of the institutions	**1 d A**
53	C-158/07	Judgment (op) ECLI:EU:C:2008:630	18/11/2008	Förster	Freedom of movement for workers	**2 a A**
54	C-499/06	Judgment (op) ECLI:EU:C:2008:300	22/05/2008	Nerkowska	Citizenship of the Union – Right of entry and residence	**6 a A**
55	C-428, 429, 430, 431, 432, 434/06	Judgment (op) ECLI:EU:C:2006:757	11/09/2008	Comunidad Autónoma de Castilla y León	Competition – State aid	**6 b A**

56	C-120 – 121/06 P	Judgment ECLI:EU:C:2007:212	09/09/2008	Fedon & Figli and Fedon America v Council and Commission, FIAMM	Agriculture and Fisheries – Fruit and vegetables	**6 h C**
57	C-461/05	Judgment (GS) ECLI:EU:C:2009:783	15/12/2009	Commission v Denmark	Financial provisions – Own resources	**2a b C**
58	C-351/05	Judgment ECLI:EU:C:2007:809 OpinionECLI:EU:C:2007:291	18 Dec 2007 23May 2007	Laval en partneri	Freedom to provide services	**6 b B**
59	C-438/05	Judgment (op) ECLI:EU:C:2007:772	11/12/2007	International Transport Workers' Federation and Finnish Seamen's Union	Freedom of establishment	**6 b B**
60	C-372/05	Judgment ECLI:EU:C:2009:780	15/12/2009	Commission v Germany	Financial provisions – Own resources	**2a b C**
61	C-303/05	Judgment (SUM) GC ECLI:EU:C:2007:261	03/05/2007	Advocaten voor de Wereld	Justice and home affairs	**2a c C**
62	C-265/05	Judgment (SUM, OP) ECLI:EU:C:2007:26	16/01/2007	Perez Naranjo	Social security	**4 g A**

Table 12.2 (*cont.*)

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
63	C-192/05	Judgment (op, SUM) ECLI:EU:C:2006:676	26/10/2006	Tas-Hagen and Tas	Citizenship of the Union – Right of entry and residence	**6 a A**
64	C-77/05	Judgment (op) GS ECLI:EU:C:2007:803	18/12/2007	United Kingdom v Council	area of freedom, security and justice – Border checks	**2 c C**
65	C-53/05	Judgment ECLI:EU:C:2006:448	06/07/2006	Commission v Portugal	Freedom of establishment	**6 b C**
66	C-522/04	Opinion ECLI:EU:C:2006:632 Judgment ECLI:EU:C:2007:405	03/10/2006 05/07/2007	Commission v Belgium	Citizenship of the Union	**6 g B**
67	C-493/04	Judgment ECLI:EU:C:2006:167	09/03/2006	Piatkowski	Freedom of movement for workers	**4 b A**
68	C-414/04	Judgment (op) ECLI:EU:C:2006:742	28/11/2006	Parliament v Council	Energy	**3 e C**
69	C-413/04	Judgment (op) ECLI:EU:C:2006:741	28/11/2006	Parliament v Council	Energy	**3 e C**

70	Joined Cases C-266–207/04, C-276/04, C-321–325/04,	Judgment (op) ECLI:EU:C:2005:657	27/10/2005	Tout pour la maison, Komogo et al.	Competition – State aid	**5 b B**
71	C-209/03	Judgment (op) ECLI:EU:C:2005:169	15/03/2005	Bidar	Principles, objectives and tasks of the Treaties	**3 a A**
72	C-205/03 P	Judgment (op) ECLI:EU:C:2006:453	11/07/2006	FENIN v Commission	Competition – Agreements, decisions and concerted practices	**5 b A**
73	C-88/03	Judgment (op) ECLI:EU:C:2006:511	06/09/2006	Portugal v Commission	Competition – State aid	**3 b A**
74	C-46/03	Judgment (op) ECLI:EU:C:2005:725	01/12/2005	United Kingdom v Commission	Economic, social and territorial cohesion – European Regional Development Fund (ERDF)	**6 d C**
75	C-488/01 P	Order ECLI:EU:C:2003:608	11/11/2003	Martinez v Parliament	Provisions governing the institutions	**2 (other, other)**

Table 12.2 (*cont.*)

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
76	C-486/01 P 488/01 P	Order ECLI:EU:C:2002:116	21/02/2002	Front national and Martinez v Parliament	Provisions governing the institutions	**2 (other, other)**
77	C-355, 354, 264, 306, /01	Judgment (Op, Sum) ECLI:EU:C:2004:150	16/03/2004	AOK-Bundesverband and Others	Competition – Agreements, decisions and concerted practices	**5 b B**
78	C-445/00	Judgment (op, order) ECLI:EU:C:2003:445	11/09/2003	Austria v Council	Transport	**4 j C**
79	C-389/00	Judgment (op, sum) ECLI:EU:C:2003:111	27/02/2003	Commission v Germany	Free movement of goods – Customs union –Charges having equivalent effect	**5 b B**
80	C-204/00 P - 205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, C-219/00 P,	Judgment ECLI:EU:C:2002:337	07/01/2004	Cementir – Cementerie del Tirreno v Commission	Competition – Agreements, decisions and concerted practices – Concerted practices	**2 B b**

81	C-218/00	Judgment (op) ECLI:EU:C:2002:36	22/01/2002	Cisal	Competition – Agreements, decisions and concerted practices	**5 b B**
82	C-309/99	Judgment (op, SUM) ECLI:EU:C:2002:98	19/02/2002	Wouters and Others	Competition – Dominant position	**6 b B**
83	C-257/99	Judgment ECLI:EU:C:2001:491	27/09/2001	Barkoci and Malik	External relations – Association Agreement	**1 f D**
84	C-206/99	Judgment (SUM) ECLI:EU:C:2001:347	21/06/2001	SONAE	Taxation – Indirect taxation	**6 b B**
85	C-184/99	Judgment (SUM) ECLI:EU:C:2001:458	20/09/2001	Grzelczyk	Citizenship of the Union – Right of entry and residence	**2 a A**
86	C-120/99	Judgment ECLI:EU:C:2001:567	25/10/2001	Italy v Council	Agriculture and Fisheries – Fisheries policy	**3 h B**
87	C-107/99	Order (op) ECLI:EU:C:1999:338	29/06/1999	Italy v Commission	Economic, social and territorial cohesion – European Regional Development Fund (ERDF)	**1 d C**

Table 12.2 (*cont.*)

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
88	C-56/99	Judgment (op) ECLI:EU:C:2000:236	11/05/2000	Gascogne Limousin viandes	Agriculture and Fisheries – Beef and veal	**4 h B**
89	C-50/99	Judgment (op) ECLI:EU:C:2000:288	25/05/2000	Podesta	Social policy	**6 B g**
90	C-302/98	Judgment (op) ECLI:EU:C:2000:322	15/06/2000	Sehrer	non-discrimination – Non-discrimination on grounds of nationality	**2 g B**
91	C-180/98	Judgment (op) ECLI:EU:C:2000:428	12/09/2000	Pavlov	Competition – Agreements, decisions and concerted practices	**6 b B**
92	C-34/98	Judgment ECLI:EU:C:2000:84	15/02/2000	Commission v France	Freedom of movement for workers	**2 g B**

Table 12.3 *Phase 3: Treaty of Maastricht to Treaty of Amsterdam (1994–2000) eleven cases – nearly two annually*

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
93	C-219/97	Judgment (op) ECLI:EU:C:1999:437	21/09/1999	Drijvende Bokken	Competition – Agreements, decisions and concerted practices	**3 b B**
94	C-115–7/97	Judgment (op) ECLI:EU:C:1999:434	21/09/1999	Brentjens'	Competition – Agreements, decisions and concerted practices	**3 b B**
95	C-114/97	Judgment ECLI:EU:C:1998:519	29/10/1998	Commission v Spain	Freedom of movement for workers, freedom of establishment, freedom to provide services	**6 b B**
96	C-375/96	Judgment (op) ECLI:EU:C:1998:517	29/10/1998	Zaninotto	Agriculture and Fisheries – Wine	**3 h C**
97	C-84/96	Judgment ECLI:EU:C:1999:478	05/10/1999	Netherlands v Commission	Economic, social and territorial cohesion – European Regional Development Fund (ERDF)	**2a C d**

Table 12.3 (*cont.*)

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
98	C-67/96	Judgment (op) ECLI:EU:C:1999:430	21/09/1999	Albany	Competition – Agreements, decisions and concerted practices	**5 b B**
99	C-55/96	Judgment (op) ECLI:EU:C:1997:603	11/12/1997	Job Centre	Freedom to provide services, competition law, abuse of dominant position	**5 b B**
100	C-248, 49/95	Judgment ECLI:EU:C:1997:377	17/07/1997	Stapf, SAM	Transport	**4 h B**
101	C-70/95	Judgment (SUM, op) ECLI:EU:C:1997:301	17/06/1997	Sodemare and Others	Freedom of establishment, freedom of services	**1 b A**
102	C-244/94	Judgment (op) ECLI:EU:C:1995:392	16/11/1995	FFSA	Competition – Agreements, decisions and concerted practices	**5 b B**
103	C-238/94	Judgment (SUM, ECLI:EU:C:1996:132	26/03/1996	García and Others	Freedom of establishment	**2 b B**

Table 12.4 *Phase 2: European Act to Maastricht Treaty (1987–93) seven cases (less than one annually)*

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
104	C-159, 160/91	Judgment (op, SUM) ECLI:EU:C:1993:63	17/02/1993	Poucet, Pistre	Competition – Agreements, decisions and concerted practices – Concerted practices	**5 b B**
105	C-260/90	Judgment (op) ECLI:EU:C:1992:66	12/02/1992	Leplat	Free movement of goods – Customs union – Charges having equivalent effect	**1 f D**
106	C-240/90	Judgment ECLI:EU:C:1992:408	27/10/1992	Germany v Commission	Agriculture and Fisheries – Sheepmeat and goatmeat	**4 h B**
107	C-63/90	Judgment (op) ECLI:EU:C:1992:381	13/10/1992	Portugal v Council	Agriculture and Fisheries – Fisheries policy	**2a h C**
108	C-186/87	Judgment ECLI:EU:C:1989:47	02/02/1989	Cowan	Freedom to provide services	**6 g B**
109	C-203/86	Judgment ECLI:EU:C:1988:420	20/09/1988	Spain v Council	Agriculture and Fisheries – Milk products	**2a h C**
110	C-126/86	Judgment (op) ECLI:EU:C:1987:395	29/09/1987	Giménez Zaera	Social policy	**6 g B**

Table 12.5 *Phase 1: from the foundation of the EEC (1969–86)*

No.	Case no.	Ruling	Date	Parties	Area (courts category)	Category
111	C-295/84	Judgment (op) ECLI:EU:C:1985:473	27/11/1985	Rousseau Wilmot	Taxation – Value added tax	**5 tax C**
112	C-250/84	Judgment (op, SUM) ECLI:EU:C:1986:22	22/01/1986	Eridania	Agriculture and Fisheries – Sugar	**2a b B**
113	C-44/84	Judgment (op) ECLI:EU:C:1986:2	15/01/1986	Hurd	Accession	**6 f C**
114	C-72/83	Judgment (op) ECLI:EU:C:1984:256	10/07/1984	Campus Oil	Free movement of goods – Quantitative restrictions – Measures having equivalent effect	**2 b C**
115	C-75/82	Judgment ECLI:EU:C:1984:116	20/03/1984	Razzouk v Commission	Staff Regulations of officials and Conditions of Employment of other servants	**4 g B**
116	C-128/78	Judgment (SUM) ECLI:EU:C:1979:32	07/02/1979	Commission v United Kingdom	Transport	**2a, b C**

117	Avis 1/78	Opinions of the Court ECLI:EU:C:1979:224	04/10/1979	Commission	External relations – Commercial policy	**6 f D**
118	C-77/77	Judgment ECLI:EU:C:1978:141	29/06/1978	British Petroleum v Commission	Competition – Dominant position	**2a b C**
119	Avis 1/76	Opinions of the Court (SUM) ECLI:EU:C:1977:63	26/04/1977	Commission	External relations	**2a f C**
120	C-24/74	Judgment (op, Sum) ECLI:EU:C:1974:99	09/10/1974	Biason	Social security	**4 g B**
121	C-39/72	Judgment ECLI:EU:C:1973:13	07/02/1973	Commission v Italy	Agriculture and Fisheries – Milk products	**2a h C**
122	C-6/69	Judgment ECLI:EU:C:1969:68	10/12/1969	Commission v France	Conjunctural policy	**2a d C**

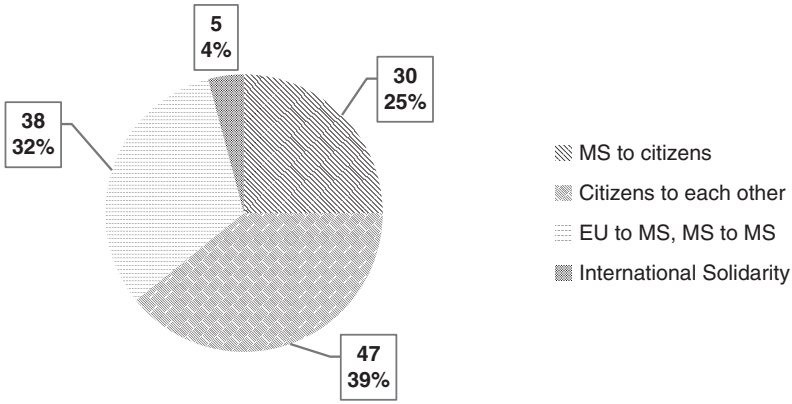

Figure 12.4 Dimensions of solidarity – frequency over time

Maastricht (in force in November 1993) introduced EU citizenship explicitly. The surge in cases after the Treaty of Amsterdam came into force by the end of 1999 seems attributable to two elements: first, EU citizenship had been recognised as obliging Member States to extend a certain degree of solidarity to citizens of other Member States, and second the heightened recognition of EU social policy through the re-integration of the 1993 protocol on social policy, and the creation of an employment chapter in 1997 may have promoted reasoning with social policy and solidarity considerations in order to curb individual rights as well as internal market rules. Overall, the EU internal dimensions of solidarity occur nearly equally, though international solidarity is very rarely used, as the pie chart above shows.

4.3 Confirming the Types of Solidarity Actually Used by the Court

In evaluating the case law, all five types of solidarity we expected to find were identifiable: the categorial types solidarity as charitable orientation without legal obligation (1), solidarity as mutually binding legal obligation (2) and solidarity as risk mitigation (3) alongside the functional types of solidarity embedding or restricting individual rights (4) or internal market concepts (5).

In addition to those five types, there was an unexpected instrumental use of solidarity by the Court, supporting the overall value of European integration. This is evidenced in two different ways. First, the Court used solidarity as an emanation of mutually binding legal obligation as a basis for supporting Member States' compliance with EU obligations, since compliance with

obligations under EU law would enhance the mutuality of this organisation. In the very first case using the concept, decided in 1969, French attempts to mitigate the effect of the 1960s economic crisis by awarding rediscount rates for local business in contravention of EEC state aid law were branded as a violation of the solidarity base of Member States' obligations to the community.[50] Similarly, the legitimacy of quotas for production of agricultural goods is supported by the principle of solidarity between producers.[51] This use of solidarity is now occurring in the field of asylum and immigration, where the specific reference to Member States' solidarity to each other is used in recent judgments to underline the admissibility of legally enforceable quotas for admitting refugees.[52] Generally, this can be characterised as within the boundaries of the second categorial type of solidarity identified above, solidarity as mutual obligation, though with an integrationist twist. This was recognised by counting those cases as a (2a) category.

Second, the Court frequently has to react to Member States' and citizens' arguments relying on solidarity structures established at national level in order to justify an exception from or restriction of EU law concepts central to socio-economic integration. For example, Member States may argue that a certain benefit or institution is based on the specific bond of solidarity between citizens of the state, and refuse to extend that benefit to EU citizens from other Member States. Accepting such an argument would endanger the wider aim of creating solidarity bonds not only between Member States, but also between their peoples. In particular if derogations from obligations flowing from economic freedoms or competition law are at stake, the Court frequently stresses that the EU principles prevail over that local or national solidarity. Similarly, if claimants rely on national solidarity, the Court may refuse to recognise this kind of solidarity as a concept of community law.[53] We class this as an additional criterion (6), exposing more clearly where the Court rejects the central value of solidarity in favour of other EU values, although either the Court, or the Commission or the AG has recognised the relevance of the value.

Figures 12.6 and 12.7 illustrate how frequently each of these six types of solidarity appear. The pie chart on overall distribution exposes the

[50] Case 6/69 *Commission* v. *France* EU:C:1969:68.
[51] Case 250/84 Eridania EU :C :1986 :22.
[52] C-643/15 *Slovakia* v. *Council* CU:C:2-18:631.
[53] Case 44/84 Hurd EU:C:1986:2.

Figure 12.5 Types of solidarity – categorial (1–3) and functional (4–6)

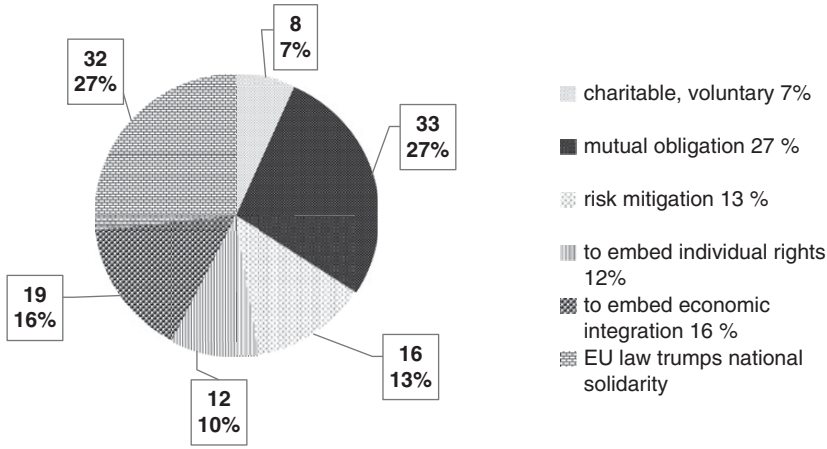

Figure 12.6 Types of Solidarity – overall

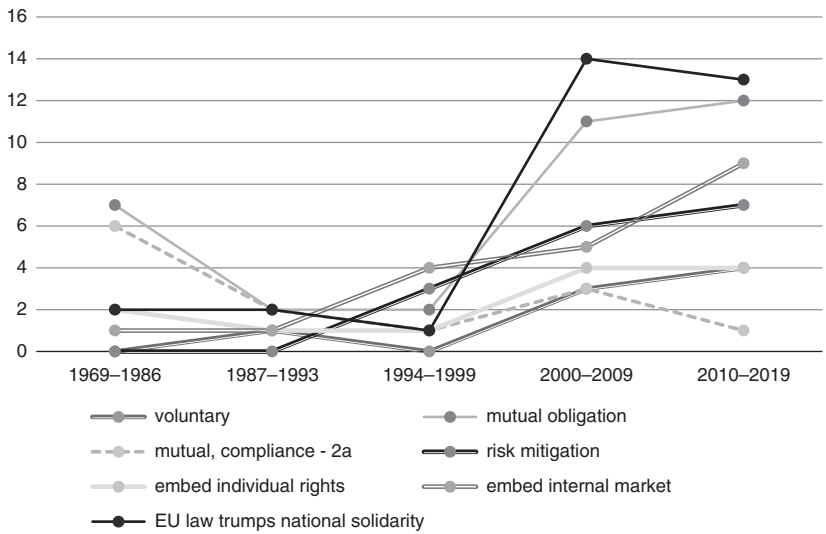

Figure 12.7 Types of solidarity over time, plus 2a category

dominance of the internal market category, while the next chart illustrates how the frequency of the different types of solidarity evolved over time. The overall frequency, depicted above in figure 12.7, was omitted in order to show the specific (2a) category as a dotted line.

4.4 *Exploring the Discourse within Six Types of Solidarity*

This section offers examples of how the different types of solidarity manifest in the Court's case law discourse.

4.4.1 Categorial Types: Solidarity as Charity, as Mutual Obligation and as Risk Mitigation

While there are only eight cases in which the Court embraced the traditional concept of solidarity as a voluntarily chosen benign act, based on charitable motives, this category trends upwardly and comprises some widely debated rulings. For example, the Pringle judgment[54] refers explicitly to Article 122 TFEU as embodying the spirit of solidarity between the Member States, only to reject that provision as a basis for financial assistance of the Union to the Member States, without any reference to the principle of solidarity. AG Kokott[55] relies on the fundamental position of solidarity among the EU's values for a narrow interpretation of Article 125 TFEU, which then does not exclude creating a fund providing aid to Member States through the European Stability Mechanism (ESM). However, as the Court, she does not in any way contribute to defining solidarity. In both instances, solidarity remains a nebulous concept potentially based on charity towards Member States suffering an economic crisis. Instead, solidarity could have been portrayed as a rational concept retaining the Union's resilience against inevitable risks emanating from a market-based economy. Similarly, a pre-modern concept of solidarity was used in two cases on allocating funds to peace-programmes in Northern Ireland. In 1999 the Court rejected an action brought by Italy, demanding that the Commission enacts a legal instrument to reduce the allocation to the structural funds in favour of the PEACE programme, following AG Mischo's reasoning that solidarity and social cohesion are incapable of engendering specific obligations.[56] A decade later, the Court uses the same rational for justifying the EC's contribution to the International Fund for Ireland.[57] At times the Court also retracts to this conservative and cautious reading of solidarity if activities at

[54] Case C-370/12 EU:C:2012:756, paragraph 115.
[55] View in case C-370/12 EU:C:2012:675, paragraphs 142-3.
[56] Case C-107/99 *Italy* v. Commission EU:C:1999:338.
[57] Case C-166/07, *Parliament* v. *Council*, ECLI:EU:C:2009:499.

national level of a social character are to be exempted from limitations, they would have to endure under EU Internal Market law. For example, in the Sodemare case, the Court exempted the statutory preference for non-profit organisation to provide locally funded care for the elderly from the control under EU state aid law because the system of social welfare was 'based on the principle of solidarity (in that it was) designed as a matter of priority to assist those who are in a state of need owing to insufficient family income';[58] and in the more recent Femarbel case[59] the 'activities essential in order to guarantee human dignity and integrity and are a manifestation of the principle of ... solidarity' were exempt from the restrictions imposed by Directive 2006/13.

While all these judgments justify initiatives that could be categorised as emanations of solidarity, they miss the opportunity to recognise that the exercise of solidarity is actually in the interest both of those in short term receipt of aid (whether Member States experiencing difficulty servicing their government debt, a region suffering from the aftermath of decades of neglect, or citizens lacking the income to lead a life in dignity) and those engaging in solidarity. This would have allowed the court to identify the mutual interest of maintaining the prosperity of the Union and its societies as a whole.

As mentioned, the category of solidarity as legally binding mutual obligation initiated the Court's solidarity case law, and was initially used as a basis for Member States obligations to comply with their treaty obligations, for example, by branding the UK's refusal to require lorry drivers to use tachographs in order to ensure compliance with working time rules as 'failure in the duty of solidarity' of Member States towards the EEC, which struck 'at the very root of the Community legal order'.[60]

The idea of solidarity as mutuality also underpins case law on EU citizenship. After first enunciating the slogan that Member States were required to extend a certain degree of (financial) solidarity to citizens of other Member States[61] without much reasoning, the Court

[58] Case C-70/95 *Sodemare et al.* ECLI:EU:C:1997:30, paragraph 27.
[59] Case C-57/12 *Femarbel* – ECLI:EU:C:2013:517, paragraph 43.
[60] Case 127/78 *Commission* v. *UK* EU:C:1979:32, paragraph 12, see also case 39/72 *Commission* v. *Italy* EU:C:1973:13 paragraph 25 and cases cited above in fn 50–2.
[61] Case C-184/99 *Grzelczyk* EU:C:2001:458, paragraph 44.

has increasingly relied on the 'genuine link' between the host Member State and the other EU citizen to support that obligation, thus injecting the criterion of mutuality. For example, in an infringement action concerning reduced fares for students against Austria, the Court conceded that 'it is legitimate for a host Member State to wish to ensure that there is a genuine link between a claimant to a benefit and the competent Member State',[62] though in the specific case being effectively enrolled in a publicly accredited higher education institution should be sufficient to establish this genuine link,[63] as was the fact that pensioners have moved to that Member State to enjoy their old age.[64] In the more recent case law on EU citizenship rights, the Court relies on liberal notions of citizenship instead of referring to solidarity and mutuality. One example is the Chavez-Vilchez litigation[65] on the right of non-EU mothers of Dutch children to remain in the Netherlands as carers. The last occasion when the requirement of Member States to extend a certain degree of solidarity towards citizens of other EU Member States in the area of residence rights was referred to was AG Wahl's opinion in the 2012 St Prix case.[66]

Recent rulings in the field of asylum and immigration policy demonstrate a more pronounced use by the Court and its advocates general of the principle of solidarity. The confidence of Member States in other states in the Schengen Area carrying out controls effectively and stringently becomes an emanation of solidarity between Member States under Article 67 TFEU in the ANAFE case.[67] AG Wathelet, in a case on international protection, is moved to base a suggestion for future legislation on the principle of solidarity, explaining 'that only the adoption of a genuine policy on international protection within the European Union with its own budget which would ensure uniform minimum living conditions for the beneficiaries of such protection

[62] Case C-75/11 *Commission* v. *Austria* EU:C:2012:605, paragraph 59.
[63] Ibid., paragraph 64.
[64] Case C-140/12 *Brey* EU:C:2013:565.
[65] Case C-133/15 (Grand Chamber), EU:C:2017:354, Opinion AG Spzunar EU:C:2016:659, referring to 'genuine enjoyment of the substance of rights conferred by virtue of their status' as EU citizens in the pivotal Ruiz Zambrano case (Case C-34/09 EU:C :2011 :124, paragraph 43).
[66] C-507/12 Opinion ECLI:EU:C:2013:841, St Prix.
[67] Case C-606/01 *ANAFE* EU:C:2012:348, paragraph 25.

would reduce, if not eliminate, the occurrence of cases such as that at issue in the main proceedings, by ensuring that the principle of solidarity and the fair sharing of responsibilities between Member States enshrined in Article 80 TFEU is a reality for the benefit not only of Member States, but above all of the human beings concerned'.[68] Nevertheless, relying on the law as it stands, he proposes for the Court to find that the Member State Germany must request a Gambian national to be retransferred to Italy, where he first made an application for international protection.[69]

The classical concept of solidarity as risk mitigating is obviously at the heart of social security provision in the EU's Member States. Accordingly, it is no surprise that the idea of solidarity as risk mitigation is referred to in the Court's case law on compulsory affiliation to social security bodies. The Kattner Stahlbau litigation is a prominent example, also because the term solidarity is found no less than twenty-two times in that ruling. The Court finds that the compulsory affiliation of employers to a liability fund providing for consequences of work accidents is necessary because 'different employers' liability insurance associations being grouped together in a risk community ... enables them to effect an equalisation of costs and risks between them'.[70] The principle of risk sharing is also characteristic of social insurance institutions such as pension funds which accept members independently of the individual risks they present, and allocate pensions not in strict proportionality to contributions.[71]

The idea of risk sharing emerges in areas beyond social security as well. For example, in the 2017 judgment on the Slovakian challenge on the Council decision on redistributing those who fled war and destitution across the EU Member States, the Court stressed that the risk to be the first country of arrival for those migrant was unevenly distributed among Member States due to geographic realities, and that the resulting burdens 'must ... be divided between all the other Member States, in accordance

[68] Opinion in case C-163/17, Jawo, EU:C:2018:613, paragraph 145.
[69] This is also reflected in the Court's ruling, though with the proviso that the first country may refuse to transfer the refugee if it obtains objective and credible evidence of a risk of degrading treatment in the country of first application (EU:C:2019:218).
[70] Case C-350/07 ECLI:EU:C:2009:127, paragraph.
[71] For example Case C-218/00 Cisal EU:C:2002:36, paragraph 39–40; C-219/97 *Drijvende Bokken* ECLI:EU:C:1999:437, paragraph 65.

with the principle of solidarity and fair sharing of responsibility'.[72] The Grand Chamber also rejected the Slovakian submission that solidarity only entails voluntary engagement to the extent the Member State decides without being bound by a legal obligation. Another example on the idea of risk sharing as an emanation of solidarity is found in the Medisanus case on the question whether a Member State may ban blood products using blood donated outside its borders.[73] Expanding on the concept of solidarity underlying Directive Dir 2004/18/EC, the Court explained that '(a)ll blood donors act in the interest of all individuals with whom they share the same interests by making it possible, together, inter alia to guard against the risks of insufficient quantities of medicinal products derived from blood or plasma.'[74]

4.4.2 Functional Types: Solidarity Embedding Internal Market Law Concepts or Individual Rights, while EU Law Concepts Cannot Be Curbed by National-based Solidarity

Both mutuality and risk sharing remain decisive in rulings where the Court uses functional types of solidarity.

Starting with the Poucet and Pistre case,[75] the Court has recognised national provisions protecting universal service providers from competition as justified through the principle of solidarity. For example, the Court argues that 'organisations involved in the public social security system fulfil an exclusively social function . . . based on the principle of national solidarity and is entirely non-profit making. The benefits are statutory benefits bearing no relation to the amount of contributions'[76] in order to justify entrusting the postal services with the payment of retirement pensions.

Most frequently, solidarity serves to justify EU legislation limiting individual rights.[77] Yet, there are also cases where the limitation of EU rights is justified by the need to protect national-level solidarity bonds. This justification was used in two widely discussed cases on the question whether a Member State can withdraw its citizenship and thus EU

[72] Case C-643/15 *Slovakia* v. *Council* EU:C:2017:631 280-92.
[73] Case C-296/15 *Medisanus* ECLI:EU:C:2017:431.
[74] Ibid., paragraph 97.
[75] C-159, 160/91 *Poucet & Pistre* ECLI:EU:C:1993:63.
[76] C-185/14 *EasyPay and Finance Engineering* ECLI:EU:C:2015:716, paragraph 38.
[77] For example, the limits of transferring the payments for a national public pension fund into the EU pension fund are justified by the principle of solidarity informing the former (C-166/12 *Časta* ECLI:EU:C:2013:792).

citizenship. In both the Rottmann and the recent Tjebbes cases the Court relied on the legitimacy to protect the 'special relationship of solidarity and good faith between it and its nationals'[78]

Much more frequently, however, the national conceptions of solidarity are rejected as a justification for limiting EU rights. The reasoning of AG Cruz Villalon in the infringement action against Luxembourg on the question whether the office of a notary can be reserved for nationals of that Member State is particularly well developed in that it uses the solidarity bond between EU citizens in order to reject the priority of that same solidarity bond limited to the national level 'In so far as it has a transnational dimension, European citizenship is founded on the existence of a community of States and individuals who share a . . . commitment to solidarity. Given that, on being awarded the nationality of a Member State, an individual is introduced into that community of values, trust and solidarity, it would be paradoxical if membership of that very community were to constitute the ground for preventing a European Union citizen from exercising the rights and freedoms guaranteed by the Treaty.'[79] This reasoning supports European-level solidarity between all EU citizens and rejects a more limited national variety. However, there are also numerous examples of judgments where the Court rejects national emanations of solidarity without suggesting an EU level equivalent, thus effectively sacrificing solidarity on the altar of the EU internal market.[80]

5 Tentative Conclusions: Missed Opportunities Abound

It is startling to realise how frequently the Court misses the opportunity to explain specifically what is meant by solidarity, and in this way, clarify this key concept. By seizing that opportunity, the Court would be able to flesh out the EU's value base. Exploring the value of solidarity would be particularly suitable for countering the identity-based challenges of the EU integration project epitomised by Brexit as well as by the increasing

[78] Cases C-135/08 *Rottmann* EU:C:2010:104, paragraph 51; C-221/17 *Tjebbes et al*. ECLI:EU:C:2019:189, paragraph 33.

[79] C-51/08 *Commission* v. *Luxembourg* ECLI:EU:C:2011:336, paragraph 138.

[80] Widely criticised rulings such as Viking (Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union, EU:C:2007:772) Laval (Case C-351/05, EU:C:2007:809) and AGET Iraklis (Case C-201/15 EU:C:2016:972) are all among those where the parties as well as the AG stressed solidarity at national level as a potential justification to restrict economic freedoms, for example.

rejection of free movement of EU citizens and the refusal to exercise international solidarity in the field of migration.

The opportunity to highlight and explore the relevance of solidarity as one of the Union's core values is even missed in cases where it should be at the heart of the argument. For example, the circumstances leading to the ruling in Gusa[81] would have allowed the Court to explore the concept: the claimant entered Ireland initially being sustained by his children, before he worked as a self-employed builder for four years, contributing to social security and the tax base, only to be refused job seekers' allowance due to an alleged lack of being habitually resident in Ireland. While the Court holds that he can rely on his free movement rights to claim this very allowance, the reference to mutuality of contributions remains unexplored.

Another example can be found in the DEB case on the question whether national legislation requiring a special public interest test to be satisfied before a legal entity can claim legal assistance for representation in court.[82] Germany had claimed, in defence of the rule, that legal assistance is organised on the basis of solidarity, which cannot be extended to legal entities instead of natural persons. This argument, which bordered at limiting solidarity to a charitable emotion, was countered by AG Kokott and the Court with reference to the fact that Article 47 Charter of Fundamental Rights of the European Union (CFREU), from which the right to legal assistance derives, was not placed in the Charter's solidarity chapter. This formal argument is inherently unconvincing, in particular as the CFREU's Chapter IV (Solidarity) also contains Articles 27 and 28 endowing works councils and trade unions with rights. Thus, the question is rather which legal entities would profit from legal assistance: those created to represent natural persons, or rather legal entities such as businesses which are removed from their natural owners through institutions such as shares. Accordingly, the Court has missed an opportunity to fill the term 'solidarity' with life.

More concerning, in the Wightman ruling on the UK's option to unilaterally revoke the notification of its intention to withdraw from the Union,[83] the Court relied on citizenship as a fundamental status to support its argument. However, free movement – a liberal right – is presented as the most important aspect of citizenship, and not the partial

[81] Case C-442/16 EU:C:2017:1004.
[82] Case C-279/09 *DEB* EU:C:2010:811.
[83] Case C-621/18 *Wightman and Others* EU:C:2018:999.

extension of solidarity from the host Member States towards those EU citizens who dare using their free movement rights.[84] The Full Court's grandiose reference to Article 2 TEU including the sentence on solidarity thus rings hollow in this regard, as the Court missed an opportunity to elaborate on the practical relevance of this principle.

Observing and evaluating the case law using the term of solidarity, we have exposed a high degree of inconsistency. Evaluating from a normative perspective the Court's approach to this 'cardinal value of the European Union', one would hope that the Court follows the example of some of its advocates general and specifies the application of this principle in those cases where citizens expect to be included in the Union's solidarity. The frequent reference to the solidarity between the Member States to each other and to the Union should not lead to obscuring the fact that solidarity is based on mutual support of persons, which can only lead to effective risk mitigation if there is a sufficient number of persons and the willingness of the better off to shoulder burdens communally. Thus, the Court could make more of the principles of solidarity in the field of EU citizenship, social policy, anti-discrimination law and allow solidarity structures at national, transnational and European level to conquer adverse effects of internal market law. There is a long way towards developing a consistent approach to the principle, which can be used in more cases than presently. Such uses could contribute to supporting a more inclusive constitutional discourse on European integration than the mere reliance on liberal constitutional principles.

Solidarity in ECJ Case Law – Documentation of Coding

Up to March 2019 – only closed cases, those where solidarity was not relevant are eliminated.

The column 'category' uses the type of solidarity as a number, the dimension of solidarity as a capital letter, and the policy field as a normal letter.

Types of solidarity: (1) Solidarity as charity, voluntary engagement based on ethics, (2) Solidarity as mutual obligation, legally enforceable [(2a) supporting MS compliance with EU law], (3) Solidarity as risk mitigation, insurance, (4) Solidarity to embed individual rights, (5) Solidarity to embed economic integration, (6) national solidarity recognised, though it does not trump EU law obligations

[84] Ibid., paragraph 64.

Dimensions of solidarity: A Member States towards citizens (of other MS, or their own, especially if they have moved), B Citizens' direct solidarity towards each other, C EU and its Member States towards each other D International Solidarity (EU and/or its Member States to other states)

Policy fields: (a) EU citizenship, (b) law of economic integration, (c) immigration, asylum, area of security, freedom and justice, (d) economic policy, including cohesion funds, (e) energy policy, (f) external relations, (g) anti-discrimination law and social law and policy, (h) agricultural policy, (i) other